601 Pennsylvania Ave., NW
Suite 800
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March 28, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Ex Parte Notification***

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*

Dear Ms. Dortch:

On March 26, 2019, John Hunter of T-Mobile USA, Inc. ("T-Mobile"),[1/] Russell Fox of Mintz, and I met with General Counsel Thomas M. Johnson, Jr., Deputy General Counsel Ashley Boizelle, and Deputy Associate General Counsel William Richardson regarding the above-referenced proceeding.

We stressed that the 180 megahertz of spectrum that would be made available under the C-Band Alliance proposal in this proceeding is insufficient because, among other reasons, it would be unable to support the mid-band spectrum requirements of multiple providers. Instead, we urged that the Commission conduct an incentive auction for the 3.7-4.2 GHz band (the "C-band"), the structure of which was described in T-Mobile's *ex parte* letter submitted in this proceeding, copies of which were distributed at the meeting, along with other recent *ex parte* letters submitted by or on behalf of T-Mobile.

In particular, the auction structure would include not only satellite operators but also earth station registrants, which would foster competition and lead to a more efficient reallocation of the spectrum. Moreover, an incentive auction conducted for different geographic areas provides a market-based mechanism to determine the most appropriate balance of terrestrial versus satellite use of the C-band and provides flexibility for that use to vary geographically. In contrast to the C-Band Alliance proposal, an incentive auction would be open, transparent, and market-based and could deliver a portion of the purchase price to U.S. taxpayers, consistent with the Communications Act. We also noted that an incentive auction would not take materially longer than the private transactional approach proposed by the C-Band Alliance, and it would produce an outcome that better serves the public interest.

1/ T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc., a publicly-traded company.

We reiterated that the private process by which the C-Band Alliance would select licensees of C-band spectrum is contrary to the Communications Act and the public interest. We noted that the Commission is not free to avoid its obligation to conduct an auction when it receives competing applications by simply electing not to accept applications in the first instance. We also demonstrated the flaws in the C-Band Alliance's argument that the Commission may avoid auctions by using "alternative mechanisms," a narrow option not applicable here. In contrast, we pointed out that an incentive auction is precisely the type of licensing mechanism that Congress envisioned when re-licensing spectrum currently held by others. We pointed out that the Commission has ample authority to modify authorizations to accommodate post-incentive auction operations that require the use of less spectrum than is in operation today.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket and a copy is being provided to the staff with whom we met. Please direct any questions regarding this filing to me.

Respectfully submitted,

/s/ Steve B. Sharkey

Steve B. Sharkey
Vice President, Government Affairs
Technology and Engineering Policy

Attachments

cc: (each by e-mail, with attachments)
Thomas M. Johnson, Jr.
Ashley Boizelle
William Richardson

601 Pennsylvania Ave., NW
Suite 800
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202-654-5900

February 15, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Written Ex Parte Communication***

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*

Dear Ms. Dortch:

An incentive auction remains the most efficient, market-based means of licensing terrestrial wireless operations in the 3.7-4.2 GHz band ("C-band"). An incentive auction of the C-band spectrum, which is explained in greater detail below, would have three simple steps. *First*, the Commission would hold a forward auction in which terrestrial operators bid to establish a purchase price for the C-band spectrum in every Partial Economic Area ("PEA"). *Second*, that purchase price would be offered to satellite operators and earth station registrants. *Third*, the Commission would award the purchase price in the PEA to whichever group that is willing to clear the band for the least amount of money. The auction and associated clearing process can significantly reduce the time to make spectrum available and launch competitive Fifth Generation ("5G") services compared to the C-Band Alliance ("CBA") proposal.[1/]

This incentive auction process would provide an open and transparent process to allow the market to decide the maximum efficient amount of spectrum that should be reallocated for mobile broadband deployment. Moreover, an incentive auction of the C-band would – unlike the CBA proposal – comply with the Communications Act, allow participation by all stakeholders, and benefit U.S. taxpayers by returning a portion of the proceeds to the U.S. Treasury.

1/ The CBA proposal would repurpose a maximum of 180 megahertz of spectrum in the C-band, by allowing the CBA to enter into private negotiations with one or more wireless mobile operators to clear and repack incumbent downlink operations in that spectrum.

A Refined Incentive Auction Proposal

T-Mobile USA, Inc. ("T-Mobile")[2/] proposed a C-band incentive auction as the most efficient, truly market-based approach for making spectrum available and licensing it though a transparent process that complies with statutory requirements and promotes the public interest.[3/] Based on discussions with interested parties, T-Mobile outlines below an incentive auction approach that even better incorporates all stakeholder interests – not just the interests of the satellite operators – and unlocks more C-band capacity for terrestrial use. This incentive auction proposal includes a mechanism through which satellite earth station registrants can participate in the auction. Including earth station registrants will provide competition in the reverse auction and the opportunity for those entities to directly obtain auction proceeds, leading to a more efficient reallocation of spectrum.[4/] Including earth station registrants in the incentive auction will also encourage them to use alternative delivery mechanisms, such as fiber, to deliver content and help fund the expansion of fiber to previously unserved areas.[5/]

The Three-Step Incentive Auction Process. The refined C-band incentive auction proposal features three simple steps –

- *First*, the Commission would conduct a forward auction among potential wireless broadband licensees for all 500 megahertz of C-band spectrum in each PEA (the

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[2/] T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

[3/] *See* Reply Comments of T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 5-13 (filed Dec. 11, 2018) ("T-Mobile Reply Comments").

[4/] Under T-Mobile's earlier incentive auction proposal, earth station registrants would have been compensated indirectly by satellite operators. *See* T-Mobile Reply Comments at 3, 18.

[5/] As noted below, because winning satellite operators would be responsible for accommodating remaining earth station registrants, the satellite operators could be required, using auction proceeds, to reimburse earth station registrants for the costs incurred during the transition, including any costs associated with transitioning operations to alternative media such as fiber. And as other commenters have pointed out, fiber may even be preferable over the C-band for some operations because it offers lower latency than C-band connectivity, greater capacity, and greater security from radio frequency interference. *See, e.g.*, Comments of CTIA, GN Docket No. 18-122, *et al.*, at 17-18 (filed Oct. 29, 2018) ("Fiber can substantially replace some services provided by FSS without significant disruption to customers. Delivering data traffic through fiber cables has advantages in terms of lower latency, greater capacity, enhanced security, and lower cost. Compared to satellites in particular, fiber offers security from radiofrequency interference; much greater capacity; significantly lower latency; and improved economics compared to the cost of deploying and maintaining satellites. Further, fiber is heavily deployed throughout the United States, and is becoming more and more available in rural areas"); Comments of Verizon, GN Docket No. 18-122, at 14 (filed Oct. 29, 2018) ("Much C-band traffic can be transitioned to fiber where fiber is readily available, particularly in urban or suburban areas. Fiber offers lower latency than C-band connectivity, greater capacity, and greater security from radio frequency (RF) interference. And fiber is increasingly available.").

geographic area through which T-Mobile proposes that C-band spectrum be licensed) to determine a MHz-pop purchase price for each license.

- *Second*, the purchase price for each market would be offered to the incumbents, both satellite operators and earth station registrants. Offering the purchase price will result in one of four possible outcomes –

  - If the satellite operators agree to clear the band at the purchase price, but the earth station registrants do not, the auction ends. The satellite operators receive the purchase price and clear the band for terrestrial use.

  - If the earth station registrants agree to clear the band at the purchase price, but the satellite operators do not, the auction ends. The earth station registrants receive the purchase price and clear the band for terrestrial use.

  - If neither the satellite operators nor the earth station registrants agree to clear the band at the purchase price, the forward auction resumes at a lower clearing target, such as 400 megahertz instead of 500 megahertz (or some other appropriate decrement), and the two categories of incumbents bid on the resulting forward auction purchase price for the reduced clearing target as before.[6/]

  - If both the satellite operators and the earth station registrants agree to clear the band at the purchase price, the purchase price is reduced until only one group of operators – satellite or terrestrial – accept the price.

- *Third*, the purchase price would be provided to the winning bidders, subject to whatever portion of the proceeds the Commission retains for the benefit of American taxpayers. If they are the winning bidders, the satellite operators can divide the proceeds consistent with their consortium agreement or, in case they do not form an agreement, according to a default sharing rule established by the Commission. If they are the winning bidders, the earth station registrants would likewise divide the proceeds, but do so based on the population covered by each station's protected contour.[7/] Similar to satellite operators, earth station registrants could form a consortium consistent with the Commission's rules, but would not be required to do so.[8/]

6/ In addition to these steps, the incentive auction would have two other important features. *First*, the Commission will set a minimum level of spectrum – T-Mobile has suggested 300 megahertz – for which it will conduct only a forward auction. *Second*, after the auction is complete, the Commission would conduct an assignment round, similar to the Broadcast Incentive Auction or the upcoming millimeter wave auction.

7/ The size of each earth station registrant's share of the forward-auction proceeds would be a direct result of the population covered by that station's protected contour because all earth station registrants are assumed to occupy the full amount of the spectrum offered in the forward auction. The more population an earth station registrant can clear, the more money that earth station registrant will receive.

8/ While T-Mobile initially proposed that satellite operators participate in an incentive auction through a consortium, the Commission may wish to consider mechanisms that would permit them to

A real-world illustration of how this refined incentive auction proposal would operate is included in Attachment 1 to this letter.

Including Earth Station Registrants Improves the Incentive Auction. Under the refined C-band incentive auction proposal, both earth station registrants and satellite operators may participate in an incentive auction for a particular area, and the amount that earth station registrants can be paid as a result of the reverse auction can be significant. As shown in Attachment 1 to this letter, which includes an example for the Phoenix PEA (PEA 15), most earth station registrants in that PEA could receive between $15 million and $36 million per earth station to clear all 500 megahertz based on $0.35 per MHz-pop in the Phoenix PEA.[9/]

Including earth station registrants in the process is critical for several reasons. *First*, it recognizes the rights of earth station registrants – rights and interests completely ignored by the CBA. *Second*, it acknowledges that the ability to use spectrum in an area for terrestrial operations is directly related to the continuing presence of earth stations. Indeed, the protection of earth station operations is what limits potential terrestrial C-band use in an area. *Third*, including earth station registrants better represents a market-based approach by making that stakeholder group a part of the auction process. By providing earth station registrants economic incentives to vacate the band, the Commission can repurpose more of the C-band efficiently – the fundamental premise of an incentive auction.

A C-Band Incentive Auction is Superior to the CBA Approach and Simpler than the Broadcast Incentive Auction

In addition to the benefits that would result from including earth station registrants, the refined incentive auction approach offers many other advantages over the CBA proposal.

An Open, Transparent, and Inclusive Process. The CBA would conduct a private sale of spectrum rights (that it does not hold) with the parties that it chooses – a closed-door transaction that would allow it to have sole control of the relicensing process. Whatever limited assurances it has attempted to provide to the Commission about how its process "produces a 'win-win' outcome for all interested parties,"[10/] those assurances are not meaningful and are unenforceable.

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participate individually. For example, they could be required to divide the purchase price according to a default rule determined by the Commission, but, in any case, would have the option to contract among themselves to come to a different revenue-sharing formula.

9/ The MHz-pop value for the Phoenix PEA is based on a nationwide spectrum value for the C-band of $0.30 per MHz-pop, which is consistent with estimates provided by several analysts. T-Mobile Reply Comments at 21, n.71. In the Broadcast Incentive Auction, the value of spectrum in Phoenix exceeded the national average by approximately 18 percent, translating in this case to approximately $0.35 per MHz-pop. *See Incentive Auction: Forward Auction – Results*, FCC Public Reporting System, https://auctiondata.fcc.gov/public/projects/1000/reports/forward-results. These values are used as an example based on analyst estimates and not a price commitment by T-Mobile.

10/ Reply Comments of the C-Band Alliance, GN Docket No. 18-122, *et al.*, at 5 (filed Dec. 11, 2018) ("CBA Reply Comments").

In contrast, as Congress envisioned, a C-band incentive auction would invite *all* interested parties to participate, including, importantly, earth station registrants. No party would be foreclosed based on the non-public decisions of a subset of current licensees.

More Spectrum. Under the CBA proposal, a maximum of 180 megahertz of spectrum would be made available for terrestrial wireless operations, including 5G wireless use.[11/] Based on the wider bandwidths that 5G will require to support applications like video streaming, that amount of spectrum, as many parties agree, is simply insufficient to meet the needs of multiple competitive providers.[12/] A C-band incentive auction, however, can provide the incentives and means to make up to 500 megahertz of spectrum available in a market. Combining competitive forward and reverse auctions would greatly increase the potential to clear the full 500 megahertz in many markets and eliminate the ability of a satellite consortium to manipulate prices by limiting supply.

Spectrum Available on a PEA-by-PEA Basis. Under the CBA proposal, only 180 megahertz would be made available on a nationwide basis.[13/] In addition to unnecessarily limiting the amount of overall spectrum that will be made available, this approach fails to recognize that satellite operators or earth station registrants may be willing to relinquish more spectrum in some areas than in others. A C-band incentive auction, however, would account for the differential value of the spectrum in terrestrial and satellite use in different areas by making spectrum available on a PEA-by-PEA basis. Many markets have ample alternative transmission media, such as fiber,[14/] which can make more spectrum available for terrestrial use in those markets. Providing incentive auction funds to those directly involved with content distribution would also provide a means to fund the deployment and reach of fiber in new areas.

Not only would this approach make the maximum efficient amount of spectrum available in each market, but it also would be easier to administer than the Broadcast Incentive Auction. The Broadcast Incentive Auction required a nationwide coordinated band plan with a complex

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11/ *See* Comments of the C-Band Alliance, GN Docket No. 18-122, at 5 (filed Oct. 29, 2018) ("CBA Comments").

12/ *See, e.g.*, Comments of CTIA, GN Docket No. 18-122, *et al.*, at 9 (filed Oct. 29, 2018) ("For an effective mid-band 5G initiative, a substantial amount of 3.7-4.2 GHz spectrum, in the range of hundreds of megahertz, needs to be transitioned nationwide."); Comments of Ericsson, GN Docket No. 18-122, at 10 (filed Oct. 29, 2018) ("[T]he Commission should make sure that hundreds of megahertz of usable spectrum is transitioned for 5G and other next generation services as quickly as possible."); Comments of Nokia, GN Docket No. 18-122, *et al.*, at 7 (filed Oct. 29, 2018) ("The public interest demands that the Commission require a plan and path forward for clearing additional spectrum in the band over and above the recently proposed 200 MHz.").

13/ *See* CBA Comments at 5.

14/ As T-Mobile previously explained, long-haul fiber infrastructure in the U.S. is robust and can replace satellite use in many locations at a relatively low-cost. *See* Comments of T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 8 (filed Oct. 29, 2018) ("T-Mobile Comments").

optimization process that required the use of a supercomputer.[15/] And each time the clearing target was reduced, another complicated optimization process was required between stages.[16/] A C-band incentive auction, in contrast, would only need to determine the population cleared in a market and establish a buying price for clearing that population. If an offer is not accepted, the buying price would be adjusted or the amount of spectrum would be reduced for that market, providing a clear and simple path to clearing spectrum without the need for a coordinated nationwide plan.

Speed. The CBA argues that its proposal would bring the C-band spectrum to market for wireless use quickly. But the CBA's claims of superior speed are unfounded, and the approach comes at the expense of an inferior amount of spectrum and deep legal flaws. A C-band incentive auction can potentially make the spectrum available significantly more quickly than the CBA proposal. Even if there is a relatively small difference in the time required to develop the rules for a C-band incentive auction and run the auction, with significant earth station participation, the clearing process can occur much more quickly than the CBA approach because moving content to fiber could occur much faster than launching new satellites and would eliminate years from the clearing process. This would reduce the time for actually launching 5G services by one to two years compared to the CBA proposal.

The actual C-band incentive auction process would proceed much more quickly than the Broadcast Incentive Auction. In the Broadcast Incentive Auction, the reverse auction of each stage required at least 50 rounds of bidding, regardless of the amount of spectrum targeted for clearing in that stage.[17/] A C-band incentive auction, on the other hand, would require only a few rounds of bidding in the reverse auction. This is especially true if spectrum levels in the incentive auction are reduced at relatively large intervals such as, for example, 100-megahertz intervals, which would result in only two spectrum levels (*i.e.*, 500 megahertz and 400 megahertz) before the Commission conducts only a forward auction.

Revenues for Taxpayers. Under the CBA proposal, the satellite operators would retain all funds from the sale of the C-band spectrum.[18/] The CBA proposal would allow the satellite operators – who did not initially pay for the spectrum and do not have the terrestrial rights they propose to sell – to receive a windfall without any return to the public. Allowing satellite operators to receive a windfall for rights they do not hold is inconsistent with Congressional directive.[19/] Under a C-band incentive auction, not only would satellite operators and earth station registrants

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15/ *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶¶ 44-48, 113, 330 (2014) ("*Broadcast Incentive Auction Report and Order*").

16/ *See, e.g.*, *Clearing Target of 114 Megahertz Set for Stage 2 of the Broadcast Television Spectrum Incentive Auction; Stage 2 Bidding in the Reverse Auction Will Start on September 13, 2016*, Public Notice, 31 FCC Rcd 9628, ¶ 5 (2016).

17/ *See Broadcast Incentive Auction Report and Order* ¶¶ 457-58.

18/ *See* Letter from Jennifer D. Hindin, Counsel for the C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, Attachment (filed Dec. 19, 2018).

19/ *See* T-Mobile Reply Comments at 26-28.

receive a financial benefit, but revenues could also be earmarked for the U.S. Treasury for the benefit for U.S. taxpayers. In fact, a C-band incentive auction could represent a significant return for U.S. taxpayers because there would be little need to set aside repacking costs. Earth station registrants that choose to remain in operation would have limited retuning costs because they would be allowed to continue to receive satellite signals, modified appropriately so that they are protected for only the spectrum in the PEA that remains designated for satellite operation.

Consistent with the Communications Act. The CBA proposal would contravene Congressional intent. Section 309(j)(1) of the Act requires the Commission to use a "system of competitive bidding" when it receives "mutually exclusive applications" for "any initial license."[20/] While the CBA seeks to circumvent this mandate by requiring terrestrial service providers to negotiate private agreements with the CBA, the Commission cannot avoid its obligations under Section 309(j)(1) by simply outsourcing the process of assigning initial applications. In contrast, a C-band incentive auction would be consistent with the Communications Act. Because the Commission would certainly receive mutually exclusive applications for this spectrum, triggering its obligation to conduct a system of competitive bidding, the C-band incentive auction would allow the Commission to fulfill its mandate under Section 309(j)(1) of the Act.

In addition to fulfilling the Commission's obligation under Section 309(j)(1), a C-band incentive auction would be consistent with Section 309(j)(8)(G)(ii) of the Communications Act. That section authorizes the Commission to encourage a licensee to voluntarily relinquish some or all of its spectrum in an incentive auction so long as: (1) the Commission conducts a reverse auction; and (2) there are multiple bidders.[21/] Because the satellite operators could elect not to bid and permit earth station registrants to win the reverse auction, and earth station registrants could likewise elect not to bid and permit the satellite operators to win the reverse auction, a C-band incentive auction would clearly be voluntary. To the extent the authorizations of satellite earth station registrants would potentially be modified to operate on less than the 500 megahertz for which they are now authorized or satellite operators would be required to provide alternative transmission media, a C-band incentive auction would still be voluntary, similar to the Broadcast Incentive Auction. Indeed, the Commission relocated many broadcasters after the Broadcast Incentive Auction even if the broadcaster decided not to participate.[22/]

In addition, the incentive auction plan described above would satisfy Section 309(j)(8)(G)(ii) of the Act. *First*, the Commission would conduct a reverse auction after it conducts a forward auction (the Act does not require the Commission to conduct the reverse and forward auctions in a particular order).[23/] *Second*, there would be multiple bidders in a C-band incentive auction –

20/ 47 U.S.C. § 309(j)(1).

21/ *Id.* § 309(j)(8)(G)(ii).

22/ *See Broadcast Incentive Auction Report and Order* ¶¶ 168, 297.

23/ Indeed, in the 39 GHz proceeding, the Commission plans to combine the reverse auction with the forward auction. *See Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Fourth Report and Order, GN Docket No. 14-177, FCC 18-180, ¶ 9 (rel. Dec. 12, 2018) (stating that "the clock phase of the incentive auction format we plan to use serves as both a reverse auction that will determine the amount of incentive payments as well as a forward auction to assign new flexible use licenses").

both satellite operators *and* earth station registrants. Satellite operators and earth station registrants could each form separate consortia, but would not be required to do so. The previously expressed incentive auction proposal assumed the satellite operators would bid as a single consortium. But in the absence of a consortium, the Commission can direct that the proceeds be apportioned by the number of satellite operators, or by the number of in-orbit satellites each operator has, or by some other objective measure – just as the earth station registrants' proceeds are divided by populations their protected contours cover as a default in the event no consortium exists.

Closing the Digital Divide Through Fiber Deployment and More Spectrum. Because the CBA contends that fiber is not a workable alternative to C-band spectrum,[24/] its proposal does not take into account its potential benefits or does anything to support fiber deployment. In a C-band incentive auction, winning satellite operators would be responsible for accommodating remaining earth station registrants, including potentially by relocating those operations to remote areas, as T-Mobile has suggested, using fiber.[25/] While most areas of the country are already served with fiber, any additional fiber-builds, particularly to rural areas either to facilitate the relocation of earth stations to rural areas, or to replace an earth station in a rural area as an alternative transmission mechanism, can have broader benefits. In particular, this additional fiber can be shared with others to provide connectivity where little may exist today. A C-band incentive auction could therefore help close the digital divide. By providing funds and incentives to use and deploy fiber more broadly, a C-band incentive auction presents an opportunity for greater fiber connectivity even in areas where it is not currently deployed.

A C-Band Incentive Auction Would be Simpler and Faster than the Broadcast Incentive Auction

Auctionomics' recent *ex parte* letter in this proceeding criticizes the T-Mobile proposal for not being the same as the Broadcast Incentive Auction.[26/] But incentive auctions can take many forms consistent with the Communications Act and need not be patterned on the Broadcast Incentive Auction.

As the Commission itself has recognized, it is not hamstrung to simply repeat the processes that constituted the Broadcast Incentive Auction.[27/] T-Mobile's refined proposal meets the fundamental criteria for incentive auctions as specified in the Act and satisfies the four principles Auctionomics set forth in its letter: (1) voluntary; (2) opportunity for separate bidding; (3) efficient quantity of spectrum to be reassigned; and (4) positive incentives.

24/ CBA Reply Comments at 11.

25/ T-Mobile Comments at 8-10.

26/ Letter from Paul Milgrom, Chairman, Auctionomics Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Jan. 21, 2019) ("Auctionomics Letter").

27/ *See Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Fourth Further Notice of Proposed Rulemaking, 33 FCC Rcd 1660 ¶ 44 (2018) ("Congress expressly authorized the Commission to conduct incentive auctions beyond the broadcast television spectrum incentive auction.").

The CBA's private transaction approach is precisely the opposite of an efficient market mechanism. It would result in the sale of spectrum through non-transparent, behind-the-scenes transactions that would fail to include all stakeholders and deprive taxpayers of any benefit. The public interest requires an open and transparent process such as the C-band incentive auction described in this letter.

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Parties in this proceeding have recognized the advantages of a C-band incentive auction,[28/] and the Commission should move quickly to adopt rules for a C-band incentive auction that will produce market-driven results quickly and free up the maximum amount of spectrum for wireless mobile broadband.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Steve B. Sharkey

Steve B. Sharkey
Vice President, Government Affairs
Technology and Engineering Policy

Attachments

28/ *See, e.g.*, Reply Comments of United States Cellular Corporation, GN Docket No. 18-122, at 4-5 (filed Dec. 11, 2018) ("Only an incentive auction-based reallocation mechanism would ensure that a socially efficient amount of spectrum in the 3.7-4.2 GHz band is repurposed for terrestrial broadband services and assigned under a fair and transparent process that supports the public interest."); Reply Comments of the Dynamic Spectrum Alliance, GN Docket No. 18-122, at 17 (filed Dec. 11, 2018) ("The DSA continues to believe that the Commission should conduct a public auction – a time-tested and reliable method of protecting the interests of all stakeholders and ensuring a market-based result – instead of allowing for private sale."); Comments of the Public Interest Spectrum Coalition, GN Docket No. 18-122, at 26 (filed Oct. 29, 2018) ("The incentive auction authority under Section 309(j) that Congress bestowed on the Commission in the 2012 Spectrum Act is the *legitimate* 'market-based approach' that can and should be designed to work for this band."); Comments of the American Cable Association, GN Docket No. 18-122, *et al.*, at 15 (filed Oct. 29, 2018) ("If the Commission decides to reallocate the lower end of the spectrum, it should consider doing so through the mechanism of incentive auctions.").

ATTACHMENT 1

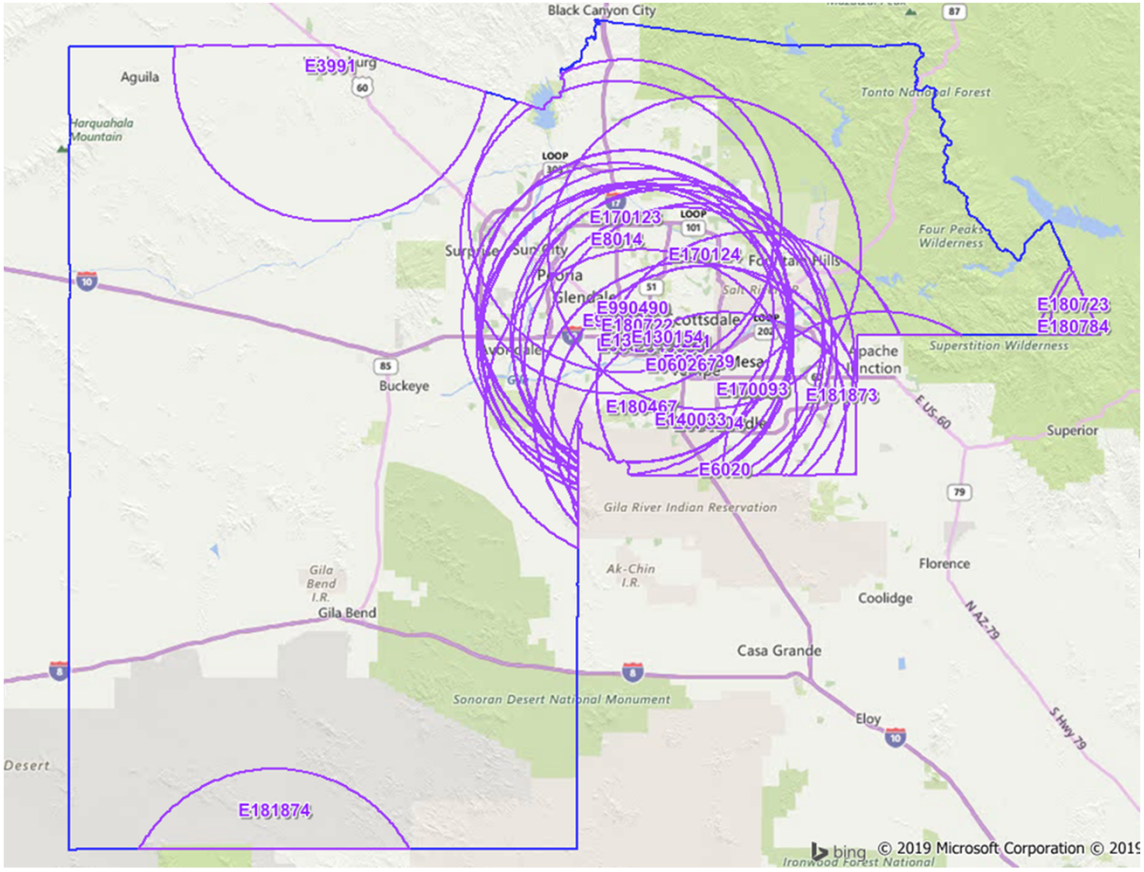
Phoenix Example – 20 mile Protection Zones

The C Band earth stations in Phoenix are shown here with a 20-mile protection zone.

To calculate the POPs, the nation is divided into a grid and Census block level population data is distributed proportionally to each grid cell

If the centroid of a grid cell is within an earth station's protection zone, then that grid cell is considered "covered" by that earth station

If *X* earth stations cover a grid cell, then each of the *X* earth stations gets attributed the POPs in that grid cell divided by *X*



The sum of the attributed POPs in all grid cells covered by an earth station gives that earth station's covered POPs

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Phoenix Example – 20 mile Protection Zones

$/MHz-POP	$ 0.35
Spectrum	500 MHz
PEA POPs	3,817,117
Total Revenue	$ 667,995,475

- Assume the wireless market can provide $48 billion for the auction
- This is roughly a nationwide average of $0.30 per MHz-POP for 500 MHz
- In the Broadcast Incentive Auction, the price in Phoenix exceeded the national average by about 18%
- Thus it is reasonable to expect about $0.35 per MHz-POP in Phoenix
- At that price point, most earth station operators can expect to receive $15 to $36 million to clear all 500 MHz

Call Sign	Total Covered POPs	Share of Forward Auction Revenue
E8014	2,459,826	$ 36,236,720
E170123	2,186,153	$ 30,915,690
E990464	2,872,824	$ 30,816,979
E950195	2,919,462	$ 28,654,221
E990490	2,917,093	$ 28,584,109
E000529	2,916,230	$ 28,551,352
E180722	2,981,929	$ 27,651,379
E000528	2,949,170	$ 26,983,304
E130055	2,958,434	$ 26,613,465
E880093	2,958,973	$ 26,421,828
E130154	3,030,206	$ 26,012,871
E050221	2,999,729	$ 25,280,835
E040085	2,993,910	$ 25,238,467
E170124	2,470,446	$ 25,033,821
E060267	2,908,841	$ 23,969,629
E980439	2,839,742	$ 23,535,198
E180467	2,365,400	$ 18,464,196
E010254	2,148,533	$ 15,867,106
E010255	2,148,533	$ 15,867,106
E140033	2,148,533	$ 15,867,106
E040294	2,143,550	$ 15,803,993
E970396	1,976,080	$ 15,605,507
E020233	1,976,080	$ 15,605,502
E170093	1,976,080	$ 15,605,502
E060399	1,975,918	$ 15,604,379
E970204	2,013,077	$ 15,326,972
E181807	2,012,577	$ 15,316,481
E181816	2,012,577	$ 15,316,481
E6020	1,482,791	$ 11,394,788
E181873	675,645	$ 6,773,317
E3991	14,169	$ 2,479,510
E180784	0.5	$ 50
E180723	0.4	$ 33
TOTAL		$ 651,397,895

T··Mobile·

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January 30, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
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Washington, D.C. 20554

Re: ***Ex Parte Notification***

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*

Dear Ms. Dortch:

The C-Band Alliance continues to invent reasons why the Commission should adopt its proposal that would enrich its members, who would unilaterally decide how and to whom to sell assets they do not own. Its January 2, 2019 filing in the above-referenced proceeding, in which it claims that Commission precedent supports its plan, is no different.[1/] But the Commission precedent to which the C-Band Alliance cites does just the opposite – it demonstrates why the C-Band Alliance's proposal is contrary to the public interest, and provides further support for an approach incorporating a public incentive auction.

The Commission Has Not Granted Expanded Rights so that They May Be Immediately Sold

Contrary to the C-Band Alliance's assertions, the Commission has not previously granted new or expanded rights to incumbent licensees with the intention that those rights would be immediately sold, and it should not do so now. Instead, in cases in which incumbent licensees were granted additional rights, the Commission granted these rights so that the spectrum at issue could be used *by the incumbent licensees* to deploy new or additional services. Nowhere was that more clear than in the AWS-4 band – the first example cited by the C-Band Alliance. There, the Commission first considered the issue of whether a terrestrial allocation should be added to what became the AWS-4 band, previously primarily designated for satellite use.[2/] Then, the International Bureau considered applications to approve the transfer of the satellite service authorizations from New DBSD Satellite Service G.P. and TerreStar License, Inc. to DISH, *and*

1/ C-Band Alliance *Ex Parte*, GN Docket No. 18-122 (filed Jan. 2, 2019).

2/ *See Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz,* Report and Order, 26 FCC Rcd. 5710 (2011).

to expand DISH's rights to use the spectrum for terrestrial use.[3/] But the International Bureau declined to take the latter action, just approving the transfer.[4/] Only afterwards did the Commission separately consider whether to grant the transferee DISH terrestrial authority.[5/] In fact, in the rulemaking proceeding adopting service rules, the Commission evaluated whether the satellite licensee – DISH – should even have terrestrial rights (or whether they should be licensed independently).[6/] There was no guarantee that DISH would ever get terrestrial rights. And when the Commission provided DISH with those terrestrial rights, it certainly was not with the expectation that they would be sold.[7/] To the contrary, in asserting that the Commission should make changes to its rules for the AWS-4 band, DISH argued that it would become a "disruptive competitor in the wireless market."[8/]

Similarly, in the *Spectrum Frontiers* proceeding, the Commission granted terrestrial mobile rights to existing licensees in the 28 GHz and 39 GHz bands in order to allow those same licensees to deploy mobile service and to allow them flexibility in how they designed their

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3/ *See ICO Global Communications (Holdings) Limited; DBSD North America, Inc. Debtor-in-Possession; New DBSD Satellite Services G.P. Debtor-in-Possession, Transferors, and DISH Network Corporation, Transferee, Consolidated Application for Authority to Transfer Control*, IBFS File Nos. SAT-T/C-20110408-00071, SES-T/C-20110408-00424 and -00425 (filed Apr. 8, 2011); *TerreStar Networks Inc., Debtor-in-Possession; and TerreStar License Inc., Debtor-in-Possession, Transferors, and DISH Network Corporation and Gamma Acquisition L.L.c., Transferees, Consolidated Application for Transfer of Authorizations*, IBFS File Nos. SAT-ASG-20110822-00165, SES-ASG-20110822-00992, -00993, -00994, and ITC-ASG-20110822-00279 (filed Aug. 22, 2011).

4/ *DBSD North America, Inc., Debtor-in-Possession; New DBSD Satellite Services G.P., Debtor-in-Possession; Pendrell Corporation, Transferor; and TerreStar License Inc., Debtor-in-Possession; Assignor, and DISH Network Corporation, Transferee; and Gamma Acquisition L.L.C.; Assignee; Applications for Consent to Assign/Transfer Control of Licenses and Authorizations of New DBSD Satellite Services G.P., Debtor-in-Possession and TerreStar License Inc., Debtor-in-Possession*, Order, 27 FCC Rcd. 2250 (IB 2012).

5/ *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, et al*., Report and Order and Order of Proposed Modification, 27 FCC Rcd. 16102 (2012).

6/ *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, Notice of Proposed Rulemaking and Notice of Inquiry, 27 FCC Rcd. 3561, ¶ 72 (2012).

7/ *See Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, et al*., Report and Order and Order of Proposed Modification, 27 FCC Rcd. 16102, ¶ 177 (2012). The Commission also stated that assigning the AWS-4 spectrum rights to the existing 2 GHz Mobile Satellite Service ("MSS") licensees (*i.e*., DISH) was further justified because spectrum sharing between separately-licensed MSS and terrestrial operators was not yet possible in the band. *Id*. ¶ 183. But, unlike the proposals for the 3.7-4.2 GHz band, satellite operations in the AWS-4 spectrum were not relocated. Since satellite operations in the 3.7-4.2 GHz band will be cleared from spectrum made available for terrestrial mobile use – eliminating sharing concerns – this consideration does not weigh in favor of granting existing licensees expanded rights.

8/ Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, ET Docket No. 10-142, *et al.*, at 1 (filed Nov. 8, 2012).

systems.[9/] In fact, one of the bases of the Commission's decision in those cases was its contemplation, when it first established rules for the 28 GHz and 39 GHz bands, that licensees would have the opportunity to engage in mobile operations if the then-existing technical issues could be resolved.[10/] The Commission granted mobile rights to incumbents in the 24 GHz band for similar reasons.[11/] In this case, the members of the C-Band Alliance have no plans to put the 3.7-4.2 GHz band to use for terrestrial services. Instead, they seek to enlist the Commission's assistance for one reason – to sell spectrum that they acquired for free for potentially billions of dollars – an enormous transfer of wealth away from the public for an amount of spectrum on which the C-Band Alliance will unilaterally decide.

The Commission's approval of the sale of AWS-1 spectrum by a consortium of cable operators is wholly unrelated to the C-Band Alliance's proposal. In that case, spectrum had earlier been re-designated for use by terrestrial mobile systems. Then, the spectrum was auctioned to a variety of entities, including cable operators. But there was never any relationship between the previous holders of spectrum rights – generally microwave licensees – and auction winners. And, as in the cases above, the rights at issue were not acquired by the cable companies for the purpose of being sold. The fact that cable operators, after acquiring spectrum at auction, determined not to proceed with business plans that included terrestrial wireless spectrum and therefore sold the licenses they acquired at auction is unremarkable. In fact, the Commission explicitly found that there was no evidence that the cable companies had "obtained the AWS-1 licenses for the principal purpose of trafficking in those authorizations."[12/]

9/ *See Use of Spectrum Bands Above 24 GHz For Mobile Radio Services,* Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, ¶¶ 37, 83-87 (2016). The Commission was also concerned that separating fixed and mobile rights would complicate coordination and lead to disputes that would make providing service more difficult for all licensees – an outcome that would not be an issue here since satellite users will be relocated from spectrum made available for terrestrial mobile use. *See id*. ¶¶ 38, 86.

10/ *See id*. ¶ 37 (noting that the Commission expected "that it would expand the [28 GHz] LMDS authorization for Fixed Service to include Mobile Service if proposed and supported by the resulting record" and that the "technology of the time did not enable the use of these frequencies for advanced mobile services"); *id*. ¶ 83 ("When the Commission established rules for the 39 GHz band, it contemplated that 39 GHz licensees would have the opportunity to engage in mobile operations if the associated technical issues could be resolved.").

11/ *See Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Second Report and Order Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order, 32 FCC Rcd. 10988, ¶ 42 (2017) (stating that converting existing licenses would "allow current licensees to focus on growing and transitioning their networks in line with new and developing industry standards").

12/ *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, et al*., Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd. 10698, ¶ 45 (2012).

Instead of Supporting the C-Band Alliance Approach, the Precedent It Cites Shows that an Auction Would Best Serve the Public Interest

As commenters in this proceeding have explained,[13/] an open and transparent auction process will allow market forces to determine the true value of the C-Band spectrum for terrestrial mobile services and, based on that value, how much current licensees would relinquish at those prices. This approach is consistent with the Communications Act and would ensure that the spectrum is put to its highest and most efficient use in a manner that fosters competition.

As detailed above, when the Commission added a terrestrial allocation to a spectrum band, it intended the incumbent licensee to take advantage of that added authorization. When the Commission's intentions were not realized, the public interest suffered. Indeed, the cases cited by the C-Band Alliance demonstrate why private transactions that follow the addition of terrestrial authority to existing licenses generate fewer public benefits than a Commission auction. For instance, despite the Commission's intention that the license conversions in the 28 GHz and 39 GHz bands would allow existing licensees to deploy mobile services, these license conversions instead resulted in the immediate flip of the spectrum to Verizon and AT&T,[14/] generating enormous profits for the incumbents but preventing others from accessing the spectrum. An auction of the spectrum, however, could have promoted competition and encouraged innovation by a wider range of entities. Likewise, the conversion of the AWS-4 spectrum for the benefit of the incumbent has resulted in no use of the spectrum by DISH to date. DISH's current plan for build out would use only a tiny portion of its available AWS-4 spectrum capacity, leaving the remainder – almost all of its AWS-4 spectrum – fallow.[15/] If this spectrum had been auctioned, it likely would have been put to much more productive use by wireless carriers. Instead, DISH has warehoused this spectrum for years.

To protect the public interest and maximize the amount of spectrum that will be made available for wireless mobile broadband, the Commission should reject the C-Band Alliance's proposal

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13/ *See, e.g.*, Comments of the T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 2-5 (filed Oct. 29, 2018); Comments of United States Cellular Corporation, GN Docket No.18-122, at 5 (filed Oct. 29, 2018).

14/ *See Application of Verizon Communications Inc. and Straight Path Communications, Inc. For Consent to Transfer Control of Local Multipoint Distribution Service, 39 GHz, Common Carrier Point-to-Point Microwave, and 3650-3700 MHz Service Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 188 (WTB 2018); Application of Cellco Partnership d/b/a Verizon Wireless and XO Holdings; For Consent to Transfer Control of Local Multipoint Distribution Service and 39 GHS Licenses, Memorandum Opinion and Order, 32 FCC Rcd. 10125 (WTB 2017); *Application of AT&T Mobility Spectrum LLC and FiberTower Corporation For Consent to Transfer Control of 39 GHz Licenses*, Memorandum Opinion and Order, 33 FCC Rcd. 1251 (WTB 2018).

15/ *See* Letter from Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH Network Corporation, to Donald Stockdale, Chief, Wireless Telecommunications Bureau, ULS Lead Call Signs T070272001, T060430001, WQJY944, and WQTX200 (filed Sept. 21, 2018).

and adopt an approach to clearing the 3.7-4.2 GHz band that incorporates an incentive auction, as is supported by numerous parties in this proceeding.[16/]

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Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Steve B. Sharkey

Steve B. Sharkey
Vice President, Government Affairs
Technology and Engineering Policy

16/ *See, e.g.*, Comments of the T-Mobile USA, Inc., GN Docket No. 18-122, *et al*., at 2-5 (filed Oct. 29, 2018); Comments of the Public Interest Spectrum Coalition, GN Docket No. 18-122, at 26 (filed Oct. 29, 2018); Comments of United States Cellular Corporation, GN Docket No.18-122, at 4-5 (filed Oct. 29, 2018); Comments of the American Cable Association, GN Docket No. 18-122, *et al.*, at 15-16 (filed Oct. 29, 2018).

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March 4, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Written Ex Parte Communication***

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*

Dear Ms. Dortch:

In its recent *ex parte* letter, the C-Band Alliance ("CBA") attempts to defend the deep legal flaws of its proposal to engage in private transactions to assign spectrum rights in the 3.7-4.2 GHz band ("C-band") – rights it does not hold – to the parties of its choosing.[1/] But the CBA cannot disguise that its proposal is inconsistent with the Communications Act (the "Act") and FCC precedent. Instead, it remains clear that the CBA's proposal is a self-serving attempt to strip the Commission of its statutory obligations – safeguards that were in put place by Congress to ensure that the public interest is served – and direct all financial gains to entities who not only do not have the terrestrial rights they propose to sell, but also did not initially pay for the spectrum.

The CBA Misconstrues, Misapplies, and Ignores Congressional Intent

The CBA argues that Section 309(j)(1) of the Act does not mandate competitive bidding, but instead limits its use to instances where the Commission *accepts* mutually exclusive applications.[2/] The CBA further argues that Section 309(j)(6)(E) of the Act directs the Commission to consider means to *avoid* accepting mutually exclusive applications.[3/] The CBA is wrong about how both of these provisions operate.

Section 309(j)(1) While the trigger for the requirement that the Commission use competitive bidding is the *acceptance* of mutually exclusive applications, the Commission is not free to evade Congress' clear direction by ignoring the fact that there would be mutually exclusive applications for the C-band and simply declining to accept them. The Commission routinely

1/ *See* Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for the C-Band Alliance, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 6, 2019) ("CBA Letter").

2/ *See id.* at 2.

3/ *See id*.

adopts rules covering the submission of mutually exclusive applications and schedules auctions for repurposed spectrum even before any competing applications are received.

For instance, in the *Spectrum Frontiers* proceeding, the Commission acknowledged that its statutory mandate in Section 309(j) "applies to the mmW bands" and stated that "[c]onsistent with the Commission's policy that competitive bidding places licenses in the hands of those that value the spectrum most highly, we believe that it would be in the public interest to adopt a licensing scheme for the Upper Microwave Flexible Use Service which allows the filing of mutually exclusive applications that, if accepted, would be resolved through competitive bidding."[4/] And the Commission made the same determination in its 3.5 GHz band proceeding for Priority Access Licenses ("PALs").[5/] Those decisions demonstrate that the Commission's expectation that multiple parties will compete for the spectrum at issue necessitates the acceptance of mutually exclusive applications. Indeed, had the Commission not expected to receive mutually exclusive applications for licenses covering those spectrum bands, it would not have adopted a licensing scheme that allowed for the acceptance of mutually exclusive applications for those bands.

A C-band incentive auction would likewise warrant the acceptance of mutually exclusive applications that trigger competitive bidding. As evidenced just by the record to date, the Commission can expect widespread interest and participation in an incentive auction for C-band spectrum,[6/] creating the mutual exclusivity that requires the Commission to conduct an auction for the spectrum.

4/ *See Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Notice of Proposed Rulemaking, 30 FCC Rcd 11878, ¶¶ 244-45 (2015); *see also Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, et al*., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, ¶ 244 (2016) ("*2016 Spectrum Frontiers Order*") (adopting its proposal to accept mutually exclusive applications and recognizing that "it would be in the public interest and consistent with [the FCC's] statutory mandate to adopt a licensing scheme that allows the filing of mutually exclusive applications for licenses in the 28, 37, and 39 GHz bands which, if accepted, would be resolved through competitive bidding").

5/ *See Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Further Notice of Proposed Rulemaking, 29 FCC Rcd 4273, ¶ 54 (2014) ("Consistent with the Commission's policy that competitive bidding places licenses in the hands of those that value the spectrum most highly, we believe that it would be in the public interest to adopt a licensing scheme for PALs which allows the filing of mutually exclusive applications that, if accepted, would be resolved through competitive bidding."); *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, ¶ 122 (2015) (adopting a licensing scheme that allows the filing of mutually exclusive applications, triggering the use of competitive bidding, for PALs).

6/ *See, e.g.*, Comments of AT&T Services, Inc., GN Docket No. 18-122, at 5-7 (filed Oct. 29, 2018) (explaining that mid-band spectrum "is known to be critical for the development of robust, wide area 5G systems" and asserting that configuring the C-band for optimal utility "will depend upon a reallocation substantial enough to provide multiple licensees with the opportunity to obtain significant spectrum depth in the band"); Comments of Verizon, GN Docket No. 18-122, at i, 3 (filed Oct. 29, 2018) (pointing out

Even if the Commission is uncertain regarding whether it expects robust participation for a particular spectrum band, the answer is not to avoid accepting mutually exclusive applications. To the contrary, the Commission accounts for the fact that it may not receive mutually exclusive applications for some licenses by removing from auction those licenses where there is no mutual exclusivity.[7/] The steps the Commission is required to take are clear: accept potentially mutually exclusive applications, contemplating the use of competitive bidding, and then remove from auction any licenses for which there is limited or no interest.

Section 309(j)(6)(E) The CBA is also incorrect that the Commission has broad authority under Section 309(j)(6)(E) to use alternative mechanisms, such as negotiations, to avoid mutual exclusivity, and thereby the need to conduct auctions, in its licensing proceedings.[8/] Nothing in the Communications Act allows the Commission to issue licenses based on negotiations among private parties to avoid mutual exclusivity for initial applications.[9/]

Congress Acted to Prevent Exactly What the CBA Proposes

Legislative history does not support the CBA's contention that the Commission is obligated to consider private negotiations under Section 309(j)(6)(E).[10/] The CBA's recitation of legislative history stops in 1997. As the Public Interest Spectrum Coalition has pointed out, subsequent history makes clear that Congress did not intend for any private negotiations to result in the type of windfall that the CBA would receive through its proposal.[11/] Indeed, Congress specifically enacted legislation to prevent such behavior.

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that "[m]id-band spectrum is critically important for 5G deployment" and urging the Commission to "repurpose as much 3.7-4.2 GHz spectrum as possible as quickly as possible for use in 5G networks"); Comments of United States Cellular Corp., GN Docket No. 18-122, at 3 (filed Oct. 29, 2018) ("Given the significant importance of the 3.7-4.2 GHz band to next generation wireless services and the wireless industry generally, USCC urges the Commission to utilize an incentive auction-based reallocation mechanism for this spectrum in order to maximize the amount spectrum repurposed for mobile broadband services and to ensure that all interested parties have an opportunity to compete for, and acquire, new flexible use licenses for this spectrum.").

7/ *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, 27 FCC Rcd 12357, ¶ 291 (2012) ("Where only one party seeks a particular license offered in competitive bidding, that license will be removed from the competitive bidding process and the Commission will consider that party's non-mutually exclusive application for the license through a process separate from the competitive bidding."); *see also* 47 C.F.R. § 1.2102(a).

8/ *See* CBA Letter at 4.

9/ *See id.* at 4-5.

10/ *See id.* at 3.

11/ *See* Comments of the Public Interest Spectrum Coalition, GN Docket No. 18-122, at 28-30 (filed Oct. 29, 2018).

As the CBA recognizes, Congress expanded the FCC's auction authority in 1997 and set the stage for the 700 MHz auction by requiring broadcasters to be repacked as part of the digital television ("DTV") transition.[12/] When it became apparent that the plan adopted by the FCC could result in a windfall to broadcasters, Congress acted specifically to reverse that plan by passing the Auction Reform Act of 2002.[13/] That statute required the FCC to delay its then-scheduled 700 MHz auction, reverse its initial plan, and ensure that the auction "did not result in the unjust enrichment of any incumbent licensee."[14/] The Auction Reform Act passed largely as a result of the recognition by some senators that allowing the broadcasters to negotiate private deals in advance of an auction that governs the transfer of spectrum and allow them to earn profits would be "outrageous."[15/] In 2008, the Commission auctioned the band in an open and transparent manner, raising over $19 billion.[16/]

The parallels between what the Commission would have sanctioned in 2001 – which was specifically rejected by Congress – and what CBA proposes today are uncanny. Then, the Commission stated that it would not stand in the way of private agreements between broadcasters and potential wireless providers that would facilitate the transition of spectrum, in exchange for broadcasters receiving a percentage of the auction proceeds from ultimate auction winners.[17/] Among the other reasons for the Commission's proposal was the alleged speed by which the spectrum would be made available for 3G operations.[18/] Some broadcasters gloated over the "windfall" they would receive from this process, prompting Congress to act.[19/]

12/ *See* Balanced Budget Act of 1997, Pub. L. No. 15-33, 111 Stat. 251.

13/ *See* Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715.

14/ *Id*.

15/ *See* David Enrich, *Hollings Criticizes FCC Spectrum Plan*, MULTICHANNEL (Oct. 19, 2001), https://www.multichannel.com/news/hollings-criticizes-fcc-spectrum-plan-379161; Statement from Sen. McCain, 148 Cong Rec. 2220 (Mar. 21, 2002).

16/ *See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 73 and 76*, Public Notice, 22 FCC Rcd 18141 (2007); *Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572, ¶ 1 (2008).

17/ *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Report and Order, 15 FCC Rcd 476 (2000); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, et al.*, Memorandum Opinion and Order, 15 FCC Rcd 20845 (2000); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, et al.*, Third Report and Order, 16 FCC Rcd 2703 (2001).

18/ *See* Norman Ornstein and Michael Calabrese, *Hey Give Back Those Airwaves – Or Pay Up*, WASHINGTON POST (Oct. 14, 2001), https://www.washingtonpost.com/archive/opinions/2001/10/14/hey-give-back-those-airwaves-or-pay-up/f80d86d7-2103-4a51-8f39-8a65dd78a7cc/?utm_term=.d3f8a213df7a.

19/ *See, e.g.*, *id.*; Bill McConnell, *Paxson Eyes $46B Mark*, BROADCASTING AND CABLE (Sept. 3, 2000), https://www.broadcastingcable.com/news/paxson-eyes-46b-mark-77696.

The CBA now wants the Commission to proceed down the same path that Congress already rejected. Alleging that its process would put spectrum to use for 5G operations more quickly,[20/] and similar to the broadcasters in the 700 MHz proceeding, the CBA proposal would allow the CBA to engage in private negotiations in advance of licensing C-band spectrum. Congress' direction is clear: incumbent licensees cannot manipulate the process of re-purposing spectrum, even based on claims that doing so will result in quicker spectrum use. Indeed, any question that the Auction Reform Act was intended to prevent the Commission from implementing the CBA's proposal was erased when Congress directed the Commission to conduct incentive auctions under Section 309(j)(8)(G). Section 309(j)(8)(G) demonstrates Congress' clear intent that the FCC must conduct an incentive auction when incumbent licensees voluntarily relinquish spectrum that is being converted for other uses.

The proposed 700 MHz negotiations and the CBA's proposed negotiations are different from the types of *post-auction* clearing negotiations in which 600 MHz licensees have been engaged as a part of the Broadcast Incentive Auction. For example, and as the Commission is aware, T-Mobile has made a voluntary commitment to compensate certain low-power television stations that are unable to obtain a permanent channel in time to accommodate T-Mobile's rapid deployment of broadband service in the 600 MHz to move to a temporary channel before moving to a permanent channel.[21/] These negotiations occurred *after* the Commission's incentive auction already determined the winning bidders and ensured a fair dissemination of the licenses. Moreover, the payments are directly related to the licenses T-Mobile has received. They are not, like the arrangements in the 700 MHz proceeding and the arrangements contemplated in the CBA's proposal, payments that would generally encourage the incumbents to relinquish spectrum that prospective licensees may or may not receive.

The Single Case the CBA Cites Does Not Support its Assertion

The CBA cites *Damsky v. FCC* in support of its argument that negotiations among private parties are permitted under Section 309(j)(6)(E) of the Act as a means of avoiding mutual exclusivity.[22/] But the *Damsky* case is not instructive on this point.

First, the *Damsky* case was decided when the Commission resolved mutually exclusive applications through comparative hearings (or "beauty contests") that assessed applicants' basic

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20/ *See* CBA Letter at 10 (claiming that the CBA's proposal "will bring valuable spectrum to market years ahead of any alternative proposal").

21/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-306, *et al.*, at 1 (filed Aug. 4, 2017) (noting that "T-Mobile is willing to go beyond what is required and compensate these stations for the additional move"); Letter from Steve B. Sharkey, Vice President, Government Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-306, *et al.* (filed July 17, 2017).

22/ *See* CBA Letter at 4-5; *Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000).

and comparative qualifications. In the FCC proceeding leading up to that case, Heidi Damsky and two other applicants, WEDA, Ltd. ("WEDA") and Homewood Partners, Inc. ("HPI"), filed mutually exclusive applications for a permit to construct a new FM broadcast station.[23/] Through the comparative hearing process, an Administrative Law Judge found that Damsky failed to establish her financial qualifications, dismissed her application, and concluded that HPI's application should be granted.[24/] Subsequently, HPI and WEDA entered into a settlement agreement, under the terms of which they would merge to form a new entity, contingent upon Damsky's disqualification.[25/] The Commission approved the settlement agreement and granted the permit to the resulting entity.[26/]

Damsky filed a petition for reconsideration of the Commission's decision, and during the pendency of that proceeding, the Commission released an Order adopting rules to implement its then-new authority under Section 309(l) of the Act to conduct auctions for mutually exclusive applications for construction permits that were filed before July 1, 1997.[27/] In response to that Order, Damsky urged the FCC to declare that the winner of the proceeding would be selected by competitive bidding and find that Damsky would be qualified to participate.[28/] However, the Commission rejected her claim because Section 309(l) of the Act also required the Commission, for a 180-day period, to "waive any provisions of its regulations necessary" to permit applicants

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23/ *See Applications of Heidi Damsky; WEDA, Ltd.; Homewood Partners, Inc., for Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama*, Initial Decision Of Administrative Law Judge Joseph Chachkin, 7 FCC Rcd 5244, ¶ 1 (1992) (explaining that 13 applicants were designated for comparative hearing, but the applicant pool had narrowed to include Damsky and the two others by the time the hearing was conducted).

24/ *See Applications of Heidi Damsky; WEDA, Ltd.; Homewood Partners, Inc., for Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama*, Memorandum Opinion and Order, 13 FCC Rcd 11688, ¶ 2 (1998) ("*1998 Damsky Order*").

25/ *See id.* ¶¶ 4, 5.

26/ *See id.* ¶ 7.

27/ *See* 47 U.S.C. § 309(l) (permitting, but not requiring, the FCC to conduct auctions for mutually exclusive applications received before July 1, 1997); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses et al.*, First Report and Order, 13 FCC Rcd 15920 (1998) ("*1998 Auction Order*"). At that time, Section 309(j) of the Act, in contrast to Section 309(l), *required* the Commission to grant construction permits through an auction for applications *after* July 1, 1997. *See Damsky*, 199 F.3d at 531.

28/ *See Applications of Heidi Damsky; WEDA, Ltd.; Homewood Partners, Inc., for Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama*, Order, 14 FCC Rcd 370, ¶ 9 (1999) ("*1999 Damsky Order*") (arguing that the new rules prohibited entities from participating in an auction only when denial of an application was final and that denial of her application was not final because the original order disqualifying her was still under review); *1998 Auction Order* ¶ 89 ("At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (e.g., when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction.").

to enter into settlement agreements to remove voluntarily the conflict between their applications, and the settlement agreement between HPI and WEDA fell within that 180-day window.[29/]

On appeal, the D.C. Circuit did not, as the CBA suggests, affirm the Commission's decision to grant a construction permit pursuant to a private negotiation in lieu of holding an auction. Rather, the D.C. Circuit simply agreed with the Commission that, in resolving the ambiguity surrounding the Section 309(l) auction and settlement provisions, the Commission was within its right to uphold the decision made through the comparative hearing process that the entity merged pursuant to a settlement agreement was the entity that was qualified to receive the construction permit and, consequently, that Damsky was not entitled to an auction.[30/] In other words, it upheld the Commission's decision to continue to use a comparative hearing process, which involved the use of a settlement agreement, to resolve mutually exclusive applications instead of exercising its then-new authority to use auctions to resolve mutually exclusive applications.

Second, the Commission has specifically acknowledged that the *Damsky* case is not applicable outside of comparative hearings. Indeed, in 2001, the Commission explained that the *Damsky* case involves issues "that would be rendered moot under auction procedures,"[31/] explaining that "the court affirmed [the FCC's] adjudication of the financial issue against a non-settling applicant in the context of a settlement agreement filed *before* the implementation of auction procedures."[32/]

Finally, whatever authority the Commission may have to allow parties to engage in negotiation to avoid mutual exclusivity may only be exercised *after* the Commission accepts applications, not, as the CBA would permit, before applications are even submitted. That was certainly the case in *Damsky* and remains true today. For example, the Wireless Telecommunications Bureau recently adopted procedures to permit the relicensing of 700 MHz spectrum recaptured for licensees' failure to meet performance requirements.[33/] That Public Notice contemplates that *after* the acceptance of applications, parties will be permitted to negotiate to resolve mutual exclusivity.[34/] Neither the Wireless Telecommunications Bureau acting on delegated authority

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29/ *See 1999 Damsky Order* ¶ 11 (finding that the *1998 Damsky Order* approving the settlement obviated the need for an auction).

30/ *See Damsky*, 199 F.3d at 535 ("Considering the ambiguity surrounding the interaction between the § 309(l) auction and settlement provisions as described by the Commission in the Auction Order, we conclude that the Commission adequately explained why it did not regard paragraph 89 of the Auction Order as requiring that Damsky be allowed to participate in an auction for the construction permit.").

31/ *Applications of Liberty Productions, a Limited Partnership et al.*, Memorandum Opinion and Order, 16 FCC Rcd 12061, ¶ 53 (2001).

32/ *Id.* ¶ 53 (*emphasis added*).

33/ *See Wireless Telecommunications Bureau Announces Process for Relicensing 700 MHz Spectrum in Unserved Areas*, Public Notice, WT Docket No. 06-150, DA 19-77 (rel. Feb. 12, 2019).

34/ *See id.* ¶¶ 53-55.

nor the Commission itself has ever sanctioned negotiations *before* applications were even accepted.

Section 309(j)(6)(E) Also Includes a Public Interest Determination

Any relevance that Section 309(j)(6)(E) may have to the private negotiations contemplated by the CBA must be viewed against the backdrop of the Act's requirement that the use of an alternative mechanism must be in the public interest.[35/] As T-Mobile has explained, the CBA's proposal is clearly not.[36/] The CBA's proposal not only involves closed-door transactions that would allow the CBA to have sole control of the relicensing process, but it also does not make the maximum amount of spectrum available for terrestrial wireless services because it only guarantees that 180 megahertz of spectrum will be repurposed.[37/] In addition, the CBA's approach fails to recognize that satellite operators or earth station registrants may be willing to relinquish more spectrum in some areas than in others. Any claims of superior speed of the CBA's proposal are unfounded and would come at the expense of an inferior amount of spectrum and deep legal flaws. More importantly, the CBA's proposal does not account for the interests of all relevant stakeholders – particularly U.S. taxpayers. Nor, unlike a C-band incentive auction, does its proposal do anything to support fiber deployment. Thus, even if the Act allows private negotiations as an alternative mechanism as the CBA suggests, its use in this case would not be consistent with the public interest.

The Auction Process Provides More Applicant Review than the CBA Would Permit

In response to arguments by Comcast and NBCUniversal, the CBA asserts that its approach does not involve an impermissible sub-delegation of the Commission's licensing authority under Section 309(j)(6)(E) because final authority to approve or deny a C-band license would remain with the Commission.[38/] However, the CBA ignores that the licensing process in the context of inviting mutually exclusive applications is not limited to the FCC simply reviewing long-form applications.

35/ 47 U.S.C. § 309(j)(6)(E); *see* Reply Comments of T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 26-27 (filed Dec. 11, 2018) ("T-Mobile Reply Comments").

36/ *See* T-Mobile Reply Comments at 20-37; Comments of T-Mobile USA, Inc., GN Docket No. 18-122, *et al.*, at 10-13 (filed Oct. 29, 2018) ("T-Mobile Comments").

37/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, Technology and Engineering Policy, T-Mobile, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 15, 2019).

38/ *See* CBA Letter at 5-6 (adding that sub-delegation is only impermissible if it is not authorized by statute and that, if the CBA's approach were found to sub-delegate authority to the CBA, that sub-delegation would be authorized by Section 309(j)(6)(E)'s direction to explore negotiation where consistent with the public interest). As noted above, however, such negotiations are not intended to extend to private parties, and, even if they were, the CBA's proposal would not be consistent with the public interest.

Under the CBA's proposal, the CBA would assume the FCC's vital role in collecting and reviewing initial short-form applications, if it chose to do so at all. This appropriation of the FCC's duties would allow the CBA to eliminate the safeguards that the Commission has put in place to ensure there is robust competition and a non-discriminatory dissemination of licenses. And it would allow the CBA to determine which entities, if any, would be provided with support through, for instance, bidding credits to have a fair chance at obtaining licenses. Even if the Commission has the ultimate say, the CBA's proposal provides no transparency into its selection process and runs the risk that a buyer who would have been allowed to participate by the Commission was never allowed to engage in negotiations with the CBA – taking away an important decision that should be made by the Commission and skewing results. Having the Commission rubber-stamp licensees that are hand-picked by the CBA pursuant to private transactions circumvents a key part of the licensing process and should not be permitted.

Section 309(j)(3) The CBA argues that Section 309(j)(3) of the Act, which requires the Commission to protect the public interest when assigning licenses, does not prohibit its approach because that section applies only where the Commission issues licenses by competitive bidding and because its approach ultimately advances the public interest.[39/] The CBA's argument that Section 309(j)(3) does not apply to the C-band is only right if the Commission is allowed to avoid auctions under Section 309(j)(6)(E). As noted above, it is plainly not.

The CBA also conflates T-Mobile's argument that wireless carriers should remain free to negotiate different arrangements *post-auction* with the argument that *pre-auction* private spectrum negotiations are not likely to result in optimal outcomes.[40/] Private transactions pre-auction and private transactions post-auction are very different. As demonstrated above with respect to the DTV transition, pre-auction private transactions would have allowed broadcasters to receive a windfall. Post-auction private transactions, however, occur after the Commission has conducted an auction that, among other things, ensures that applicants are fully vetted, the licenses go to the parties that value them the most, and, more importantly, any financial benefit has already gone to U.S. taxpayers. And there are regulations in place to ensure that post-auction transactions continue to serve the public interest. For example, the Commission has implemented restrictions on post-auction transactions for licenses obtained with bidding credits.[41/]

Section 309(j)(8)(G) The CBA contends that, like Section 309(j)(3) of the Act, Section 309(j)(8)(G), which permits the Commission to use incentive auctions, applies only where the

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39/ *See* CBA Letter at 6-8.

40/ *See id.* at 8-9.

41/ *See* 47 C.F.R. § 1.2111.

Commission issues licenses by auction.[42/] T-Mobile agrees and has demonstrated that an auction is required in this context.[43/]

While Congress did not mandate that the Commission conduct incentive auctions, the circumstances in this case – licensees relinquishing spectrum rights to permit the spectrum to be used for a new service – is exactly what is covered by Section 309(j)(8)(G). The provision indicates Congressional intent that any incentive auction should be conducted by the Commission and not privately. Indeed, this is evidenced by the Commission's recent decision to conduct an incentive auction for the Upper 37 GHz, 39 GHz, and 47 GHz bands when it could have permitted incumbents in those bands to engage in the same type of private sale that CBA now proposes.[44/]

Sections 303(c) and 307(b) The CBA's assertion that its proposal would not usurp the FCC's role under Section 303(c) to assign frequencies and under Section 307(b) to distribute frequencies on a non-discriminatory basis is illogical.[45/] The CBA reads both sections too narrowly.

The Commission's obligations under those provisions are not limited to rubber-stamping applications submitted by entities selected to be licensees by private parties. The FCC cannot assign the licenses in a non-discriminatory manner when it has no say in who should be allowed to apply for the licenses in the first place. As explained above, while the FCC may have the final say in who gets the licenses, it would never, under the CBA's proposal, know the parties that were initially interested in the licenses. Only after secret transactions where the CBA gets to pick and choose the ultimate winners will the FCC be aware of the identities of the potential licensees. Without knowing the full pool of potential applicants, the FCC is necessarily prohibited from ensuring that licenses are disseminated in a non-discriminatory manner as required by the Act.

Attempts by the CBA to Discredit T-Mobile are Misguided and Misinformed

The CBA attempts to contradict the recent arguments made by T-Mobile in its January 30 *ex parte* and repeats its misrepresentation that the Commission has "a long-track record of expanding rights and approving transactions to maximize spectrum use."[46/] As T-Mobile has

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42/ *See* CBA Letter at 8-9.

43/ *See* T-Mobile Reply Comment at 3-13; T-Mobile Comment at 13-15.

44/ *See Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Fourth Report and Order, GN Docket No. 14-177, FCC 18-180, ¶¶ 7-10 (rel. Dec. 12, 2018).

45/ *See* CBA Letter at 9-10.

46/ *Id.* at 10.

explained,[47/] however, the precedent the CBA cites demonstrates that in cases where the FCC has expanded rights, it has done so with the expectation that the spectrum at issue could be used *by the incumbent licensees* to deploy new or additional services, not to allow the incumbents to immediately sell those rights. While the CBA claims that its proposal seeks a "narrower expansion of its members' rights in order to convey clearing rights through secondary market transactions,"[48/] that statement is a farce as those "secondary market transactions" would involve selling the precise expanded rights that the CBA seeks.

The CBA further asserts that T-Mobile's argument that the sales of the 28 GHz and 39 GHz licenses were not in the public interest "proves too much" because any sale that involves the transfer of spectrum licenses prevents others from accessing the spectrum, including the spectrum that T-Mobile seeks from Sprint.[49/] The CBA once again confuses transactions involving spectrum for which expanded rights were created as part of the transaction and those that are simply secondary market transactions. Unlike the 28 GHz and 39 GHz licenses, the spectrum that T-Mobile seeks from Sprint is not spectrum in which Sprint was recently granted expanded mobile rights. T-Mobile is proposing to purchase rights that Sprint has long had as part of a larger business transaction. While the FCC is considering expanded use of spectrum held by Sprint in the 2.5 GHz band,[50/] that issue is a part of an unrelated proceeding that was initiated before Sprint and T-Mobile submitted applications seeking Commission consent to the transfer of control of the licenses, authorizations, and spectrum leases held by Sprint to T-Mobile.[51/]

Finally, the CBA is being willfully ignorant if it thinks that build out has no relationship to government-run auctions. An auction ensures that spectrum goes to the party that values it the most. Under the CBA's proposal, however, there can be no assurance that the ultimate licensee will be the entity that values it most highly. The secret deals that the CBA can cut may be based on a variety of strategic, non-transparent factors that are unrelated to whether the licensee values the licenses sufficiently to build them out.

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47/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, Technology and Engineering Policy, T-Mobile, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Jan. 30, 2019).

48/ CBA Letter at 11.

49/ *See id.* at 12.

50/ *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, Notice of Proposed Rulemaking, 33 FCC Rcd 4687 (2018).

51/ *See Commission Opens Docket for Proposed Transfer of Control of Sprint Corporation to T-Mobile US, Inc.*, Public Notice, 33 FCC Rcd 604 (2018).

Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Russell H. Fox

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March 19, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Written Ex Parte Communication***

GN Docket No. 18-122, *Expanding Flexible Use of the 3.7 GHz to 4.2 GHz Band*

Dear Ms. Dortch:

The C-Band Alliance ("CBA") proposal to hold a private sale of a public resource has not withstood public scrutiny, and the depth and breadth of public concern has only grown with time.[1/] As T-Mobile has demonstrated, the better approach is for the Commission to conduct an incentive auction for the 3.7-4.2 GHz band ("C-band").[2/] The CBA continues to resist this market-based solution, recently arguing that earth station registrants cannot be included in an incentive auction, as T-Mobile has proposed.[3/] But the CBA misinterprets the Communications Act (the "Act") and Commission precedent. The public interest favors the Commission exercising its discretion to include earth station registrants in a C-band incentive auction.

1/ *See, e.g.*, Letter from Brian M. Josef, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Mar. 7, 2019) ("Comcast March 7 *Ex Parte* Letter"); Letter from Barry J. Ohlson, Vice President, Regulatory Affairs, Cox Enterprises, Inc., to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, *et al.*, at 2 (filed Mar. 5, 2019) ("Cox March 5 *Ex Parte* Letter"); Letter from Nicole Tupman, Assistant General Counsel, Midcontinent Communications, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Feb. 25, 2019); Letter from Scott Blake Harris and V. Shiva Goel, Counsel to the Small Satellite Operators, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, *et al.* (filed Feb. 21, 2019); Letter from Pantelis Michalopoulos and Georgios Leris, Counsel for American Cable Association, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 12, 2019); Letter from Neal M. Goldberg, NCTA – The Internet and Television Association, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 8, 2019).

2/ *See* Letter from Steve B. Sharkey, Vice President, Government Affairs, Technology and Engineering Policy, T-Mobile USA, Inc., to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Feb. 15, 2019) ("T-Mobile Feb. 15 *Ex Parte* Letter").

3/ *See* Letter from Henry Gola, Wiley Rein LLP, Counsel for the C-Band Alliance, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (filed Mar. 7, 2019) ("CBA Letter").

Earth Station Registrations are Licenses Under the Communications Act

The CBA argues that the Communications Act prohibits earth station registrants from participating in an incentive auction for C-band spectrum. According to the CBA, Section 309(j)(8)(G) of the Act allows the Commission to conduct incentive auctions only with respect to authorizations designated as "licenses" and claims that receive-only earth station authorizations are not licenses under the Act.[4/] The CBA's interpretation of Commission authority is inconsistent with the plain wording of the Communications Act.

As the CBA recognizes,[5/] the Communications Act defines a "license" as an "instrument of authorization . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, *by whatever name the instrument may be designated by the Commission*."[6/] And the definition of "transmission of energy by radio" includes "both such transmission and all instrumentalities, facilities, and services incidental to such transmission."[7/] Receive-only earth stations are incidental to satellite operators' transmissions[8/] and are therefore "licenses" under Section 153(49) of the Act, regardless of the nomenclature used.

The CBA nevertheless asserts that the Commission has found that it would be "unreasonable" to argue that receiving facilities are incidental to radio transmissions.[9/] But, as discussed below, that statement was limited to the context of determining whether the Communications Act *required* all receive-only earth stations to obtain licenses. The Commission did not address whether receive-only earth stations registrations, in fact, qualify as licenses under the Act.

Moreover, even if receiving facilities are not considered "incidental" to radio transmissions, receive-only earth station registrations authorize the operation or use of an apparatus for "communications." Thus, as authorizations for the operation of an apparatus of communications, receive-only earth station registrations would likewise be "licenses" under the Act, regardless of the FCC's nomenclature.

4/ *See id.* at 2.

5/ *See id*.

6/ 47 U.S.C. § 153(49) (*emphasis added*).

7/ *Id*. § 153(57).

8/ *See, e.g.*, *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order, 22 FCC Rcd 8776, ¶ 16 (2007) (finding television receivers to be "apparatus" that are "incidental to . . . transmission" of television broadcasts).

9/ *See* CBA Letter at 3.

By Making Registrations for Receive-Only Earth Stations Optional, the Commission Did Not Alter Their Status as Licenses

Contrary to the CBA's suggestion, the *1979 Deregulation Order* does not show that earth station registrants are not licensees.[10/] The *1979 Deregulation Order* merely eliminated "mandatory licensing" of receive-only earth stations in order to reduce regulatory burdens;[11/] it did not change their statutory status. Receive-only earth stations still had the *option* of being licensed in order to receive protection from interference.[12/] Moreover, the authorizations that were issued to those that elected to continue to receive them were *licenses*. And those that obtained licenses were – like any other Commission licensee – subject to the provisions of the Communications Act. As the Commission explained, "those stations which have already been *licensed* and those who choose to seek *licenses* in the future will be subject to our policies and procedures developed with regard to Title III licenses."[13/]

The Commission later changed its "optional licensing" procedures to a "registration program" for domestic receive-only earth stations.[14/] That step, however, was intended only to reduce administrative burdens, not to effect a substantive change in the rights and obligations that the receive-only earth station operators held.[15/] The Commission explained that "[t]he information

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10/ *See id.* at 2.

11/ *See Regulation of Domestic Receive-Only Satellite Earth Stations*, First Report and Order, 74 F.C.C.2d 205 (1979) ("*1979 Deregulation Order*"); *see also Transborder Satellite Video Services et al.*, Memorandum Opinion, Order and Authorization, 8 F.C.C.2d 258, ¶ 44 (1981) ("*1981 Transborder Order*") (explaining that the result of the *1979 Deregulation Order* was "to eliminate mandatory licensing for domestic receive-only satellite earth stations and to reduce regulatory burdens").

12/ *See 1979 Deregulation Order* ¶ 34; *1981 Transborder Order* ¶ 44 ("Under the new deregulatory scheme, receive-only earth station operators have the option of licensing their facilities (thereby gaining full interference protection) or operating their receive-only terminals without a license (no interference protection).").

13/ *1979 Deregulation Order* ¶ 36 (*emphasis added*); *see also 1981 Transborder Order* ¶ 44 ("Although the Commission concluded that it would be desirable and feasible to exempt individual receive-only earth stations from Title III licensing requirements, other regulatory requirements remain.").

14/ *See Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services*, First Report and Order, 6 FCC Rcd 2806 (1991) ("*1991 Streamlining Order*").

15/ *See id.* ¶ 4 (noting that "a registration program would provide receive-only operators with interference protection while offering a simpler regulatory procedure"); *Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services*, Notice of Proposed Rulemaking, 2 FCC Rcd 762, ¶ 48 (1986) (recognizing that the goal of protecting earth stations "can still be achieved by substituting a simpler registration

required for an application for registration would be the same as is currently required for a license application but the program would eliminate the issuance of a formal license."[16/] In addition, the Commission emphasized that "a registration program will afford the same protection from interference as would a license issued under our former procedure."[17/] The Commission's decision therefore squarely contradicts the CBA's argument that a receive-only earth station registration is substantively different from a license for purposes of the Commission's authority and operations.

Moreover, the CBA appears to ignore the absence of any material difference in the Commission's rules between earth station registrations and earth station licenses. Section 25.131, for instance, requires both applications for licenses for receive-only earth stations operating with certain non-U.S. licensed space stations *and* applications for registrations of receive-only earth stations to be submitted using FCC Form 312.[18/] And Section 25.130 requires applications for *transmitting* earth station licenses to be submitted on that same form.[19/] This commonality is in contrast to devices that are neither required, nor permitted, to secure any FCC authorization and therefore receive no interference protections.[20/]

While the Commission said in 2015 that receive-only earth station registrations "are neither construction permits nor station licenses,"[21/] that statement was limited to the agency's consideration of *pro forma* assignments and transfers of control. The Commission took no action in that proceeding to reverse, or suggest that it intended to reverse, the determination in the *1979 Deregulation Order* that Title III policies and procedures apply to receive-only earth station registrations.

The Commission's 2015 action is consistent with many other cases where the Commission has reduced administrative burdens on licensees without affecting their status as licensees. Indeed, the Commission has streamlined certain procedures for holders of wireless licenses without

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program to eliminate the issuance of the license and the associated administrative burdens on both applicants and the Commission").

16/ *1991 Streamlining Order* ¶ 4.

17/ *Id.* ¶ 7.

18/ *See* 47 C.F.R. § 25.131.

19/ *See id.* § 25.130.

20/ *See, e.g., id.* § 15.1(a) (stating that Part 15 of the FCC's rules "sets out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license"); *id.* § 15.5(b) (stating that Part 15 devices must not cause harmful interference and must accept interference).

21/ *Comprehensive Review of Licensing and Operating Rules for Satellite Services*, Second Report and Order, 30 FCC Rcd 14713, ¶ 306 (2015).

stripping them of their characterization as licenses under Title III.[22/] And the Commission recently streamlined the procedures for reauthorizing satellite status when the license of a television satellite station is assigned or transferred.[23/] The CBA confuses the reduction of regulatory burdens with changing rights – something that has not occurred for receive-only earth station registrants.

The Public Interest Requires that Earth Stations Be Included in an Incentive Auction

As demonstrated above, earth station registrants are licensees under the plain wording of the Communications Act and relevant precedent. While Section 309(j)(8)(G) of the Act does not require that the Commission encourage all affected licensees to participate in an incentive auction, including earth station registrants in the competitive bidding process will promote competition and best capture the market participants who use the C-band spectrum as a part of their businesses.

First, satellite operators and earth station operators are two parts of a whole in a way that other licensees and their customers are not. For instance, as the Commission recently noted, "conditions are often imposed in satellite licenses that require the satellite licensee to ensure compliance with earth station power limits" and "earth station licensees are often required to comply with any other, relevant conditions in the satellite license as well."[24/] Satellite operators themselves recognize, and indeed boast about, the integration of their satellites and earth stations.[25/] In contrast, customers of wireless service providers, for example, have no obligation

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[22/] *See, e.g.*, 47 C.F.R. § 1.948(c)(1) (allowing wireless licensees to undergo certain *pro forma* transfers or assignments without requiring prior Commission approval); *see also, e.g.*, *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, Second Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 8874 (2017) (streamlining and harmonizing the FCC's license renewal and service continuity rules).

[23/] *See Streamlined Reauthorization Procedures for Assigned or Transferred Television Satellite Stations et al.*, Report and Order, MB Docket No. 18-63 and MB Docket No. 17-105, FCC 19-17 (rel. Mar. 12, 2019).

[24/] *Further Streamlining Part 25 Rules Governing Satellite Services*, Notice of Proposed Rulemaking, IB Docket No. 18-314, FCC 18-165, ¶ 4 (rel. Nov. 15, 2018); *see also 1979 Deregulation Order* ¶ 22 ("Optimum earth station design permits small orbital spacing between satellites and also increases the flexibility of space station operators to reconfigure satellite traffic to satisfy changing service requirements.").

[25/] *See, e.g.*, *IntelsatOne Terrestrial Network*, Intelsat, http://www.intelsat.com/global-network/intelsatone/overview/ (last visited Mar. 17, 2019) (claiming that its terrestrial network "operates seamlessly" with its satellite technology); *Enterprise Broadband*, Eutelsat, https://www.eutelsat.com/en/services/data/enterprise-broadband.html (last visited Mar. 17, 2019) (asserting that its Eutelsat Connectivity services are based on the reliability of its satellites and exceptional terrestrial worldwide infrastructure and that the "seamless connection" of Eutelsat Connectivity is one of the key strengths of its solutions); *see also Why Satellite?*, Telesat, https://www.telesat.com/about-us/who-we-are/why-

to satisfy any conditions imposed on their providers' licenses, and the customers themselves are not licensees.

Second, as T-Mobile has explained, the protection of earth station operations is what limits potential terrestrial C-band use in an area.[26/] Earth station participation in an auction will therefore provide an incentive for satellite operators to relinquish their spectrum usage rights. For example, to the extent earth stations in an area no longer require protection, whether as a result of discontinuing operations or the use of alternative transmission media, satellite operators covering that area may be encouraged to relinquish their spectrum usage rights.

The CBA's Claims About the Number of Earth Stations are Overstated

The CBA argues that including more than 17,000 earth stations in an incentive auction "would exacerbate the holdout problem and add insurmountable complexity and delay."[27/] But the CBA's assertion regarding the number of registered earth stations is vastly inflated. At the time the *NPRM* in this proceeding was released, there were only approximately 4,700 earth stations registered or licensed in the FCC's International Bureau Filing System ("IBFS").[28/] In its comments in response to the *NPRM*, the CBA estimated that there were 16,500 deployed C-band earth stations.[29/] The CBA claimed that the significant increase in the number of registered earth stations from the time the *NPRM* was released to the time that its comments were submitted (roughly four months) was based on several factors.[30/] *First*, it argued that the number reflected new applications filed in IBFS, which the CBA alleged it was "regularly monitoring," following the announcement of the freeze on new earth stations, including registrations that had not yet been accepted by the Commission.[31/] *Second*, the CBA stated that it was "also aware of an additional 1,408 operational C-band earth stations that have not yet registered during the Commission's limited registration window, including many earth stations operated by federal government users."[32/] The CBA subsequently revised its estimate upward to 17,000 earth

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satellite (last visited Mar. 17, 2019) (claiming that its satellites provide "[c]onsistent frequency allocation" using earth station equipment).

26/ *See* T-Mobile Feb. 15 *Ex Parte* Letter at 4.

27/ CBA Letter at 4.

28/ *See Expanding Flexible Use of the 3.7 to 4.2 GHz Band, et al.*, Order and Notice of Proposed Rulemaking, 33 FCC Rcd 6915, ¶ 15 (2018).

29/ *See* Comments of the C-Band Alliance, GN Docket No. 18-122, *et al.*, at 12 (filed Oct. 29, 2018) ("CBA Comments").

30/ *See* CBA Comments at 12; Reply Comments of the C-Band Alliance, GN Docket No. 18-122, *et al.*, at 10 (filed Nov. 28, 2018) ("CBA Reply Comments").

31/ *See id.* at 12; CBA Reply Comments at 10.

32/ CBA Comments at 12, Earth Station Annex (listing the "radio affiliate earth stations SES compiled from its customers and compared against the IBFS database of filed registrations").

stations to allegedly include earth station applications filed in IBFS since its initial comments were submitted.[33/]

The CBA has failed to explain how adding an unspecified number of new applications, including those that have not yet been accepted, to the more than 4,000 earth stations that had been registered or licensed at the time of the *NPRM* brings the estimate of earth stations to approximately 16,500, let alone 17,000. While the CBA provided a list of the 1,408 unregistered C-band earth stations in its "Earth Station Annex," adding that figure would not bring the total anywhere close to 17,000 earth stations.[34/] In fact, it would only amount to 5,408 earth stations, about one third of what the CBA estimated. Just like the rest of its proposal, the CBA's arguments do not add up.

The CBA's Proposal is Widely Opposed

The CBA claims that T-Mobile's opposition to the CBA proposal and T-Mobile's refined incentive auction proposal are intended to delay the deployment of 5G while its merger with Sprint is pending.[35/] But numerous parties – not just T-Mobile – oppose the CBA plan and agree that the secret market transactions proposed by the CBA are anticompetitive and unworkable. Indeed, the very parties that the CBA cites as "demonstrat[ing] strong opposition"[36/] to T-Mobile's proposal have recently stated just the opposite.

Comcast, for an example, has urged the Commission on several occasions to reallocate C-band spectrum through an auction mechanism because it is "superior" to the CBA's proposed approach, "which runs counter to the public interest and should be rejected."[37/] Cox similarly noted that it does not support the CBA's proposal because it "lacks significant details and ultimately calls for the FCC to abandon its critical obligation to equitably balance all interests in the band while determining the best use of the spectrum going forward."[38/] Observing that the CBA's proposal is contrary to several provisions of the Communications Act, Charter argued that the CBA's approach would "plunge the Commission into a legal quagmire that would delay

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33/ *See* CBA Reply Comments at 10.

34/ *See* CBA Comments at 12; CBA Reply Comments at 10.

35/ *See* CBA Letter at 1.

36/ *Id.* at 7.

37/ *See, e.g.*, Comcast March 7 *Ex Parte* Letter at 1; Letter from Brian M. Josef, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Feb. 22, 2019); Letter from Brian M. Josef, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Mar. 1, 2019).

38/ Cox March 5 *Ex Parte* Letter at 2.

the availability of 5G."[39/] The Small Satellite Operators likewise explained that the CBA's proposal is "fatally flawed . . . unsustainable, unlawful, and unnecessary," adding that the Commission, not a private party, should be responsible for auctioning C-band spectrum.[40/] And, in direct contrast to the CBA's most recent claims that its proposal has garnered vast support, Charter pointed out that "the only entities supporting the CBA's proposal are the foreign satellite companies who stand to benefit from its adoption, companies who manufacture satellites and satellite equipment, and one of the largest wireless providers."[41/] Therefore, the CBA's attempt to distract the Commission with false claims about T-Mobile's motivations should be rejected.

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Pursuant to Section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

/s/ Russell H. Fox

Russell H. Fox

Counsel to T-Mobile, USA, Inc.

39/ Letter from Elizabeth Andrion, Senior Vice President, Regulatory Affairs, Charter Communications, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, *et al.*, at 3 (filed Feb. 25, 2019) ("Charter Feb. 25 *Ex Parte* Letter").

40/ Letter from Scott Blake Harris, Counsel to the Small Satellite Operators, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Mar. 11, 2019); *see also* Letter from Nicole Tupman, Assistant General Counsel, Midcontinent Communications, to Ms. Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, *et al.*, at 2 (filed Mar. 14, 2019).

41/ Charter Feb. 25 *Ex Parte* Letter at 3.